No. 99-1038

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IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

The National Academy of Arbitrators, founded in 1947, is a professional organization of neutrals. Advocates for

[1] The parties have kindly consented to the submission of this brief. Letters of consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, we declare that counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of the brief.

employers or labor unions are not eligible for admission. As of May 2000 the Academy had 624 members in the United States and Canada. To be considered for membership, an arbitrator must demonstrate acceptability by labor and management through substantial and current experience in arbitrating labor-management disputes (a bare minimum of 50 cases within 5 years with a variety of parties) or, as an exception, must enjoy general recognition as an important authority in labor-management relations through scholarly publication or other activities in addition to demonstrating current but more limited experience in arbitration.

The principal purposes of the Academy, as set out in its Constitution, are "to establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of labor-management disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes ... ; to promote the study and understanding of the arbitration of labor-management and employment disputes . . . . "

The Academy is the co-author and major adjudicator of an ethical code, the previously mentioned Code of Professional Responsibility, which has also been adopted by the American Arbitration Association and the Federal Mediation and Conciliation Service. In addition, the proceedings of the annual meetings of the Academy, published by the Bureau of National Affairs, constitute the most authoritative existing collection of studies on the labor arbitration process.

The Academy believes that the involvement of the law in the arbitration process, as Congress in effect mandated by enacting Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, should serve to effectuate the purposes for which employers and unions have developed voluntary arbitration. The tenor of this Court's decisions concerning arbitration has generally fulfilled that purpose.

The present case has the potential for disturbing the salutary regime established by the Court's prior decisions. For that reason the Academy thought it appropriate to file this brief.

This case is typical of many in which an arbitrator has exercised the authority under a collective bargaining agreement to reinstate a wrongdoing employee. The extensive experience of our membership with many similar cases should place this particular instance in better perspective. Our hope is that our brief will assist the Court to understand the context in which cases like the present one arise, and to formulate doctrine supportive rather than disruptive of a process that employers and unions alike have found highly desirable for the final resolution of labor-management disputes.

SUMMARY OF ARGUMENT

A simple, basic principle should control this case. In declaring that an arbitral decision shall be "final" or "binding," a collective bargaining agreement makes the arbitrator the parties' definitive interpreter or "reader" of their contract. What he or she says the agreement means is, by definition, what the parties meant it to say. Similarly, since arbitration is the substitute for labor strife, what the award directs the parties to do is what they have contractually decided to do to resolve their dispute rather than engage in industrial warfare. In all of this the arbitrator is the parties' "agent" or "alter ego." Anything the parties could lawfully have done to settle their controversy themselves, the arbitrator is empowered to order.

The legal consequences are twofold. First, when an arbitrator has considered the "just cause" of an employee's discharge and has concluded dismissal was too severe, ordering reinstatement with or without back pay, the award should be upheld against a court challenge on public policy grounds unless the remedy prescribed by the arbitrator would

require a violation of positive law. That would answer the question left open in *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 45 n. 12 (1987). It would still leave open, however, the question of whether a contractual rule or provision could itself be set aside on the theory it violates public policy, as distinct from a statute, regulation, or common law. That might pose an issue of contract enforcement as such, where generalized public policy has traditionally played a role. In the discipline case, on the other hand, the parties, and the employer in particular, have delegated to the arbitrator the authority to fashion a remedy, taking both equitable and policy considerations into account. The arbitrator should be able to order anything the employer could have done on its own, unilaterally, or in conjunction with the union. Thus, only a specific prohibition of positive law, and not the vaguer notions of public policy, ought to prevent enforcement of an arbitral award reinstating a fired employee.

Second, even if more generalized concepts of public policy are to be considered in a challenge to an arbitration decision on discipline, there is still no basis for setting aside the award in this or similar cases. We repeat our basic principle that public policy should not prevent the enforcement of a reinstatement award unless public policy would have prevented the employer from reinstating the employee on its own or as part of a settlement with the union at an earlier stage of the grievance procedure. Both the arbitrator and the courts below gave full and careful attention to the policy issues. And the Court of Appeals got it exactly right: "[A]lthough there is a public policy against the use of illegal drugs by those in safety-sensitive positions, there is no such policy against the reinstatement of employees who have used iliegal drugs in the past" (Petition for Certiorari, App. A, pp. 3a-4a). The critical inquiry is not the triggering conduct of the wrongdoing employee, but rather the action ordered by the decisionmaking arbitrator. Any other approach would require,

in our view, the overruling of *Misco*. It would also constitute a frontal assault on the finality of arbitral awards, one of the central pillars of industrial peace, and on the statutory duty to bargain.

ARGUMENT

I. THE ABITRATOR IS THE PARTIES' DEFINITIVE INTERPRETER OR "READER" OF THEIR COLLECTIVE BARGAINING AGREEMENT, THEIR AGENT OR SURROGATE FOR FASHIONING A REMEDY, AND ANYTHING THE PARTIES COULD DO ON THEIR OWN, THE ARBITRATOR CAN DIRECT THEM TO DO.

By now it is a cliché that in labor disputes, "arbitration is the substitute for industrial strife," and "part and parcel of the collective bargaining process itself." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). A problem with clichés is that their familiar surface truths can blind us to their deeper implications. One emerging lesson is that, as was said at an annual meeting of the National Academy of Arbitrators, "the arbitrator is the parties' officially designated 'reader' of the contract. He or she is their joint alter ego for the striking of whatever supplementary bargain is necessary.... [A] reviewing court should ordinarily treat his or her award exactly as if it were a written stipulation by the parties setting forth their own definitive construction of the labor contract."[2] That is the purport of the "final" and "binding" language almost invariably found in the arbitration

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[2] Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, in Arbitration – 1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators 29, 30 (B. Dennis & G. Somers eds. 1978), *reprinted as revised in* 75 Mich. L. Rev. 1137, 1140 (1977).

clauses of collective bargaining agreements. The concept of the arbitrator as the parties' "contract reader" and "alter ego" received explicit judicial endorsement in *Cole v. Burns International Security Services*, 105 F.3d 1465, 1474-75 (D.C. Cir. 1997).

This view of the arbitrator's authority is entirely in keeping with the teachings of this Court. The aim, as set forth in *Warrior & Gulf*, *supra*, 363 U.S at 578, is to substitute "arbitration," as "part and parcel of the collective bargaining process," for "industrial strife." The arbitrator is the "*agent* appointed by the parties" to determine the "historical facts" and formulate a "fair solution." *Misco*, *supra*, 484 U.S. at 39, 41 (emphasis supplied). Before reaching the arbitration stage, the ultimate means of avoiding a work stoppage, employers and unions customarily seek an amicable resolution of their dispute through the various steps of the contractual grievance procedure. If they fail, they call upon their "agent" or surrogate to find the solution they could not devise or agree upon. The arbitrator stands in the parties' shoes. The arbitration is simply an extension of the parties' own bargaining. It follows naturally that anything the employer could lawfully have done to settle a labor dispute, unilaterally or in conjunction with the union, should be available to the arbitrator as a potential remedy.[3] What the employer and the union could have done on their own, the arbitrator can direct them (or either one of them) to do.

The implications of this analysis apply directly to the present case. Especially important is the distinction between

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[3] For the similar views of Judge Frank Easterbrook and Professors Charles Craver and David Feller, see *infra* notes 10-12 and accompanying text. We speak here only of claims that the award itself violates some legal standard. We assume for these purposes that the arbitrator has not exceeded his or her authority under the parties' commission (nor been guilty of fraud or corruption).

the roles of a court in handling contracts generally and of an arbitrator in dealing with a labor agreement. The court is an arm of the state and, once its jurisdiction is invoked, it acts independently of the consent of the parties. A trial court's interpretation of a contract is subject to correction by appellate courts. An arbitrator, on the other hand, is the parties' sole chosen spokesperson, and their alter ego or agent for fashioning such remedy as the circumstances warrant. By agreement, the employer and the union have delegated their decisionmaking powers to the arbitrator. Any solution they could have voluntarily adopted without violating some applicable legal standard should be available for the arbitrator to impose upon them. If the futility of court challenges like this one is solidly reconfirmed, the result will be an expeditious, final determination of the conditions of the parties' continuing relationship by a mutually accepted expert. The gain for all is industrial peace in place of industrial warfare.

II. AN ARBITRATOR'S DECISION FINDING A LACK OF "JUST CAUSE" FOR DISCIPLINE AND ORDERING REINSTATMENT OR OTHER RELIEF SHOULD BE UPHELD AGAINST A COURT CHALLENGE ON PUBLIC POLICY GROUNDS UNLESS THE REMEDY WOULD REQUIRE A VIOLATION OF POSITIVE LAW.

In *Misco*, *supra*, 484 U.S. at 45 n. 12, this Court expressly declined to address the question whether "a court may refuse to enforce an award on public grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." Without necessarily agreeing with the Petitioner's classification of all the cases in the lower courts, we are in accord that the result has been considerable confusion among the courts of appeals. See Petition for Certiorari, No. 99-1038, pp. 22-30, and cases cited. It is time

to end the confusion with a clear answer. An arbitral decision dealing with the "just cause" of an employee's discipline, which finds the employer's reason insufficient to justify the sanction imposed and orders reinstatement or other relief, should be sustained against a court challenge on public policy grounds, unless the remedy prescribed would require a violation of positive law. Positive law here means a statute, valid regulation, or common law precedent.

This sharper demarcation line between law and some nebulous public policy appears more responsive to the requirement in *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983), that before an arbitrator's contract interpretation can be set aside, it must violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" In *Misco*, *supra*, 484 U.S. at 43, this Court expressly stated that "our decision [in *W.R. Grace*] turned on our examination of whether the award created any explicit conflict with 'other laws and legal precedents' rather than an assessment of 'general considerations of supposed public interests.'" Although the opinions of various courts of appeals are not always crystal clear in their rationale, our position seems supported by recent decisions from the Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits.[4]

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[4] *See IBEW Local 97 v. Niagara Mohawk Power Corp.*, 196 F.3d 117 (2d Cir. 1999); *Westvaco Corp. v. Paperworkers*, 171 F.3d 971 (4th Cir. 1999); *TVA v. Tennessee Valley Trades & Labor Council*, 184 F.3d 510 (6th Cir. 1999); *Chrysler Motors Corp. v. Allied Indus. Workers*, 959 F.2d 685 (7th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992); *Homestake Mining Co. of California v. Steelworkers Local 7044*, 153 F.3d 678 (8th Cir. 1998); *UFCW Local 588 v. Foster Poultry Farms*, 74 F. 3d 169 (9th Cir. 1995); *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999); *Northwest Airlines v. ALPA*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988). *But see Exxon Corp. v. Exxon Workers*,

In accordance with the concept of the arbitrator as the parties' "contract reader" and "agent or alter ego," when an arbitrator decides a discharge was not for just cause and reinstates the employee with or without back pay, it is just as if the employer and the union had stipulated in so many words that this was the prescribed remedy under the circumstances. A court asked to set aside such an award should do so only if it concludes that an amicable settlement of the dispute by the parties themselves, incorporating the same provisions as the arbitral award, would be unenforceable. If the parties' own voluntary action would not be prohibited under federal or state statute or valid regulation, however, then the like decision of their agent or alter ego should similarly be sustained.

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118 F.3d 841 (1st Cir. 1997); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993); *Exxon Corp. v. Baton Rouge Oil & Chemical Workers*, 77 F.3d 850 (5th Cir. 1996); *Delta Airlines v. ALPA*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989). Several circuits have decisions that can be read as going in different directions on the issue. *Cf. E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Ass'n of East Chicago*, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986); *Iowa Elec. Light & Power Co. v. IBEW Local 204*, 834 F.2d 1424 (8th Cir. 1987).

Another distinction can be discerned in these cases. Those courts that more readily overturn arbitration awards on public policy grounds tend to ask whether the past conduct of the grievant violated law or public policy. Other courts, more properly, ask whether what the arbitrator directs the employer to do will violate law or public policy. Under the former approach, the reinstatement of a wrongdoing employee will often be set aside because it is viewed as tantamount to condoning the employee's past violation of law. Under the latter approach, the court appreciates that the arbitrator, who very commonly imposes a lengthy disciplinary suspension without pay, is not at all condoning the grievant's past wrongdoing. Rather, the arbitrator is focusing on whether that misconduct forever disables the grievant to work productively for the employer, taking into account longevity of service, prior discipline, work record, safety considerations, and the like.

Conversely, if a particular employee is legally barred from a job, a reinstatement award cannot be enforced. For example, in *American Postal Workers v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982), an award was set aside because the reemployment of a person who had struck against the government was forbidden by 5 U.S.C. § 7311. But except in like circumstances, an arbitrator's decision that there was no just cause for a dismissal should be upheld against attack on public policy grounds.

This Court has already held that there is no magic in invoking "safety" as the basis for resisting an arbitral award. In *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974), miners had struck to protest conditions they claimed were unsafe. A district court enjoined the strike as a breach of contract and an arbitrator ruled against the strikers' safety complaints. The Court of Appeals vacated the injunction, declaring that "no enlightened society" requires workers "to submit matters of life and death to arbitration." Quoted in 414 U.S. at 376. This Court reversed on the authority of the *Steelworkers Trilogy*.[5] In response to the concern of the lower court's majority that an arbitrator might not appreciate "the workers' interest in their own safety," it was said: "We see little justification for the court's assumption, especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust." *Id.* at 379.

An employer should be no more entitled than a union to rely on the public's generalized interest in safety as the grounds for refusing to comply with an arbitrator's otherwise legitimate award. That is especially so since the party resisting enforcement in these situations is hardly a disinterested enforcer of the public good. Invariably it is

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[5] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

seeking to promote private ends and avoid its contractual commitments to accept a final and binding arbitral decision. Furthermore, there is no reason to think that a union would be any less concerned than an employer about the genuine safety interests of fellow employees and the general public. In light of the way this Court struck the balance in *Gateway Coal* between safety concerns and arbitral finality, we see no basis for setting aside an award, at least not a reinstatement award, because of some supposed "safety" interest, unless the decision does indeed violate positive law.

There is one possible qualification or exception to the principle we advocate. It is conceivable that a distinction should be drawn between situations where the issue is whether the arbitrator's decision on the "just cause" of an employer's discipline should be sustained, and where the issue is whether a contract rule itself is contrary to public policy. The latter was the question in *Meat Cutters Local P-1236 v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982). The employer promulgated a rule forbidding meat- packing employees to report problems directly to the U.S. Department of Agriculture. An arbitrator rejected the union's challenge to the rule. The Court of Appeals upheld the trial court in overturning the award and permanently enjoining enforcement of the rule, on the grounds it violated the public policy expressed in the Meat Inspection Act, 21 U.S.C. § 601. Significantly, however, no question of employee discipline was before the court. The issue was the validity of the rule itself. That is not the issue here. This possible qualification also answers the Petitioner's contention that "ancient" common law doctrine supports its position that a court will not enforce a contract contrary to public policy. Petitioner's Brief, p. 12 n. 3.

In the seminal case on judicial review of arbitral awards, *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), a potential public policy defense existed. Employees

had struck in breach of contract over an arbitrable grievance and were discharged. The arbitrator found their conduct improper but reduced the discipline to a 10-day suspension and reinstated them. The public policy against the employees' work stoppage is strong and well defined, and based on statute. *Cf. Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962) ("basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare"); *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *see also Goya Foods*, 238 N.L.R.B 1465 (1978). Yet there was no suggestion that the reinstatement award in *Enterprise Wheel* was unenforceable for that reason.

We reiterate that the focus in this case should also be on the legality of the action ordered by the arbitrator, not on the recognized violation by the grievant. The essential vice of a nonspecific "public policy" criterion as applied to the arbitrator's directive is that it is too vague, too expansive, and too tempting for manipulation and abuse. Judges unfamiliar with the practices and mores of the industrial workplace, but endowed with strong idiosyncratic beliefs about what is right and proper, could be persuaded to substitute their own set of values for the premises and reasoning of the parties' mutually selected arbiter. That would be contrary to all the basic lessons of this Court about judicial deference to the arbitration process, and the importance of arbitral finality, from *Enterprise Wheel* right through *Misco*.

Over the years only a tiny fraction of all arbitrations – varying from less than 1.0 to 1.5 percent – have become the subject of any sort of court proceedings.[6] Yet one scholarly

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[6] Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 29 n. 5 (M. Volz & E. Goggin eds. 5th ed. 1997); Michael H. LeRoy & Peter Feuille, *The* Steelworkers Trilogy *and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 Indus. Rel. L.J. 78, 118 (1991). Overall, there has been a substantial increase in the number of arbitration

study indicated that in the six-year period preceding *Misco*, the courts of appeals vacated 66.7 percent of the awards that reached them with challenges on public policy grounds.[7] Even during the four years following *Misco*, circuit courts overturned arbitral decisions in 33.3 percent of the public policy appeals.[8] Certain lower courts have apparently still not got the word.

The inevitable result is that parties with a sincere belief that an award is wrong, or parties with a simple desire to delay compliance, will not be put off from a suit by odds on the order of only 2-to-1 against them. There is an urgent need for this Court to deliver a clear, firm message that arbitration awards, at least in disciplinary cases, can be effectively challenged only on the grounds they violate positive law, and not on the basis they are contrary to some vague, equivocal public policy. Otherwise, the whole federal structure of arbitral finality as a key to industrial peace, so carefully constructed from the *Steelworkers Trilogy* on, could be at serious risk.

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awards reviewed by the federal courts for one reason or another during the past three decades. For the five-year period of 1971-75 one commercial service listed only around 42 cases in the courts of appeals. BNA, Labor Relations Cumulative Digest and Index 1971-1975 pp. 1653-75 (1976). During the five-year periods of 1981-85 and 1991-95, the count ranged between about 95 and 135 cases. 2 BNA, Labor Relations Cumulative Digest and Index 1981-1985 pp. 2531-81 (1986); 2 BNA, Labor Relations Cumulative Digest and Index 1991-1995 pp. 2563-2604 (1996). The district courts of course entertained considerably more cases, which were often unreported.

[7] LeRoy & Feuille, *supra* note 6, at 106.

[8] *Ibid.*

III. NO "EXPLICIT PUBLIC POLICY" THAT IS "WELL DEFINED AND DOMINANT" PRECLUDES THE REINSTATEMENT OF AN EMPLOYEE WHO HAS TAKEN ILLEGAL DRUGS IN THE PAST, AND HERE STATUTORILY BASED POLICIES OF INDUSTRIAL PEACE AND THE DUTY TO BARGAIN ARE SUPPORTIVE.

Even if the grounds for vacating arbitration decisions were extended beyond positive law to encompass some broader concept of public policy, an award reinstating an employee like the grievant in the present case should not be set aside. To do so would do violence to both the holding and the rationale in *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987).

In Misco the employee operated a dangerous paper-cutting machine and had been reprimanded for "deficient performance." *Id.* at 32. It was an "established fact that traces of marijuana had been found in [his] car." *Id.* at 44. Yet even assuming a valid public policy against operating hazardous equipment while using drugs, this Court considered there was too "tenuous" a connection to find the employee actually used drugs in the workplace. *Ibid.* The Fifth Circuit's vacation of the arbitrator's reinstatement award was reversed. In the course of its opinion the Court reaffirmed the now-familiar principle that "a court's refusal to enforce an arbitrator's interpretation of [labor] contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." ' " *Id.* at 43 (emphasis in the original).[9]

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[9] Quoting *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983), which in turn had quoted *Muschany v. United States*, 324 U.S. 49, 66 (1945).

In the present case the arbitrator accepted the finding of an earlier arbitration that the grievant, a mobile equipment operator, was a "recreational user of illegal drugs and not an addicted user" (Petition for Certiorari, App. D, p. 27a). The arbitrator also credited the employee's testimony that he failed a random drug test, after passing several earlier ones, because of "a personal/family problem which caused this one time lapse in drug usage" (id. at 28a). The grievant had been "an otherwise solid employee for a significant period of time" (*id.* at 27a). Most significantly, there is no suggestion he ever used drugs on the job. The arbitrator ordered grievant "returned to work" in 2½ months (without further specification as to the nature of his duties), but subject to severe conditions (*id.* at 29a). He was required to participate in a substance abuse program for five years, get tested randomly during that period, and provide his employer with an undated letter of resignation for use if he failed any drug test in the next five years.

In enforcing the arbitrator's award, the District Court found pertinently that "the DOT [Department of Transportation] Regulations do not express an explicit, well defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use" (Petition for Certiorari, App. B, p. 20a). And in its unpublished per curiam affirmance, the Court of Appeals was, in our view, right on the mark with its succinct statement: "[A]lthough there is a public policy against the use of illegal drugs by those in safety-sensitive positions, there is no such policy against the reinstatement of employees who have used illegal drugs in the past" (Petition for Certiorari, App. A, pp. 3a-4a).

Again, we return to our underlying theme that an arbitral award in a discipline case should be tested by the standard applicable to the employer acting on its own or acting jointly with the union. What it can do without violating public policy, the arbitrator can order. In various formulations, three

distinguished observers and analysts of the labor relations scene, Judge Frank Easterbrook and Professors Charles Craver and David Feller, all agree.

Says Judge Easterbrook: "If the [business] firm, honestly implementing its contract with the employees, kept the [psychotic] or thief on the payroll, no public policy would stand in the way.... If the arbitrator acts within the scope of his authority, the decision should be treated the same as the management's own." [10] Professor Craver puts it this way: "[Courts] should thus restrict application of the public policy exception to those extremely rare instances in which the action ordered by the arbitrator would be wholly improper if directed by the negotiating parties themselves." [11] In accord with Judge Easterbrook, Professor Feller declares: "[I]f under a given collective bargaining regime, higher management would have the legal right to reverse an initial decision to discharge because of [employee] conduct violating public policy, then an arbitrator's award to the same effect, if based on the contract, should be enforced." [12]

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[10] Frank H. Easterbrook, *Arbitration, Contract, and Public Policy*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators 65, 70 (G. Gruenberg ed. 1992). *See E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Ass'n of East Chicago*, 790 F.2d 611, 618 (7th Cir. 1986) (Easterbrook, J., concurring).

[11] Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 Chi.-Kent L. Rev. 571, 604 (1990).

[12] David E. Feller, *Court Review of Arbitration*, 43 Lab. L. J. 539, 543 (1992). For earlier expressions of concern about an excessive intrusion of public policy, see Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash between the Public Policy Exception and the Duty to Bargain*, 64 Chi.-Kent L. Rev. 3, 4 (1988); Bernard D. Meltzer, *After the Labor Arbitration Award: The Public Policy Defense*, 10 Indus. Rel. L.J. 241, 242 (1988) (advocating a "balancing approach").

To the best of our knowledge, no one has suggested that the employer in the present case, or any employer in a similar case, could not lawfully have reinstated the discharged employee, either out of the goodness of its heart or because the employee was an exemplary worker or as a means of avoiding economic conflict. Indeed, the employer in this case itself reserved the right not to fire employees who tested positive for drug use. Its substance abuse policy states that such a test required discipline "up to and including termination" (Petition for Certiorari, App. B, p. 17a). The employer plainly considered itself entitled to impose a lesser discipline than discharge. And, in doing so, the employer would not have to attach the divers protective conditions that the arbitrator in fact mandated here. It follows ineluctably that the arbitral award to the same effect should stand. An arbitrator and four judges have examined the applicable Department of Transportation Regulations and none has found any legal or policy impediment to the remedy prescribed, let alone to the employer's right, which the employer explicitly reserved to itself, to take such action unilaterally.

A natural concern is that such matters as safety and health are not always the private preserve of employers and unions. The general public has a legitimate, even vital interest in the physical and mental condition of persons flying planes, piloting ships, and driving motor vehicles on our highways. Once one concedes, however, that in a given case an employer is entitled to decide, without the intervention of federal or state law or regulation, whether a drug or alcohol user can continue to operate such equipment, there is no reason to suppose that a professional neutral, properly authorized and briefed, is any less capable than the usual employer to make that decision.

Every decision about the discharge of an employee who engages in conduct that may endanger the workplace involves

a balancing of the interest in safety and the interest in justice to the erring employee. Unions and employers alike are concerned about both interests. When they disagree on the proper balance between safety and justice, they call upon the arbitrator as their surrogate to decide, pursuant to the "just cause" mandate of their contract, whether the employer's decision to discharge has struck the right balance. The arbitrator's judgment does not exclude but indeed must include consideration of safety and public policy. What this Court said in *Misco*, *supra*, 484 U.S. at 45, is highly relevant here:

> Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task.... Had the arbitrator found that [grievant] Cooper had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.

Accordingly, even though "the question of public policy is ultimately one for resolution by the courts," *W.R. Grace*, *supra*, 461 U.S. at 766, quoted in *Misco*, *supra*, 484 U.S. at 43, arbitrators have traditionally taken public policy into account in deciding safety issues. In an early study, Professor Alfred Blumrosen concluded that arbitrators "handle public policy considerations with understanding and intelligence." [13] A "just cause" determination by its very nature creates what Professor Edgar Jones, a past Academy president, called a "necessity for an arbitrator to assess the 'common stock of

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[13] Alfred W. Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 Rutgers L. Rev. 217, 263 (1960).

ideas' about what is tolerable in our society." [14] Recent cases demonstrate the continuing validity of that observation.

The latest, still-incomplete volume of BNA's Labor Arbitration Reports contains several such decisions. *North Star Steel, Texas*, 114 LA 234 (K. Eisenmenger 1999), upheld the discharge of an employee whose urine specimen was adulterated by nitrites, which can prevent the detection of marijuana. Said the arbitrator: "The addition of a masking agent by the employee to his urine sample subverts the purpose of the drug testing program and the Company's ability to maintain a safe work environment for the employee and other employees." *Id.* at 243-44. The discharge of a fork-lift operator was also sustained in *Biolab, Inc.*, 114 LA 279 (D. Brodsky 2000). The arbitrator commented: "The employee works not only with motorized vehicles, but also with dangerous chemicals." *Id.* at 284.[15]

Even if arbitrators feel a discharge too harsh in a given case, they will weigh safety factors in substituting a lesser sanction. Thus, in *Nature's Best*, 114 LA 217 (J. Grabuskie

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[14] Edgar A. Jones, Jr., *The Role of Arbitration in State and National Labor Policy*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators 42, 53 (G. Somers & B. Dennis eds. 1971).

[15] For other examples of abitration decisions during the past decade implicating law and public policy concerning workplace safety, *see Exxon Pipeline Co.*, 109 LA 951 (J. Abercrombie 1997) (DOT standards for alcohol abuse); *Avnet, Inc.*, 107 LA 921 (D. Kadue 1996) (California law on drug rehabilitation); *Rothe Development, Inc.*, 106 LA 97, 99 (B. Baroni 1996) ("Safety considerations ... are of paramount importance when evaluating drug and alcohol possession and use in the workplace"); *Columbia Gas of Pennsylvania*, 102 LA 513 (J. Duff 1994) (DOT regulations regarding drug use applied to gasline employee); *Westinghouse Hanford Co.*, 101 LA 46 (L. Nelson 1993) (Department of Energy regulations regarding alcohol abuse applied to nuclear facility employee).

1999), the operator of a mechanized "picker" in a warehouse was injured and took a pain killer prescribed for another person. He later tested positive for codeine. The arbitrator set aside his discharge but imposed a 30-day suspension, stating: "[W]hile the Grievant's behavior might have been innocent, the fact is, what he did was unlawful and potentially dangerous and ... he must be considered to have been impaired to a degree." *Id.*at 222.

Arbitrators have been expressly advised by two of their most scholarly colleagues to make clear in their opinions that they are taking public policy into account. Dean Roger Abrams and Professor Dennis Nolan counseled: "[T]he arbitrator must strive to write an award that will actually *deter* legal challenges.... To meet this test, more is required in the decision than a basis in the agreement and a result consistent with public policy. The opinion must, in addition, be clear, orderly, reasoned, and complete." [16]

The arbitrator in the present case, as we have previously indicated, was plainly concerned that workplace safety was at stake and carefully factored it into his decision. He declared: "One avoids [drugs] because drugs have a negative impact on job performance, safety and company liability. Drugs and work simply don't mix" (Petition for Certiorari, App. D, p. 28a). He then framed a remedy aimed at ensuring "that the company and union will not be required to use arbitration again for this grievant where drugs are involved" (*ibid.*). That included reinstatement of a prior arbitration award providing for grievant's return to work only after a substance-abuse professional approved by the company had determined the

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[16] Roger I. Abrams & Dennis R. Nolan, *Arbitral Craftsmanship and Competence*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators 313, 315-16 (G. Gruenberg ed. 1989) (emphasis in the original).

employee had successfully completed a treatment program and was fit to return; a requirement of random drug testing over five years; and mandatory resignation in the event of a positive test for any illegal drug during that period (*id.* at 29a; Petition for Certiorari, App. B, p. 16a).

There are strong, statutorily based countervailing policies to the concern about safety as it affects the finality of the arbitration process. We have spoken repeatedly about the federal labor laws' promotion of arbitration as a "substitute for economic warfare." *Lucas Flour*, *supra*, 369 U.S. at 105. Even more fundamental is the duty to bargain under Section 8(a)(5), (b)(3), and (d) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), (b)(3), and (d). Safety on the job is a mandatory subject of bargaining.[17] Petitioner would have us pursue the will-o'-the-wisp of a hypothesized "public policy" about safety as a brake on employer commitments, while there is staring us in the face the reality of a well-established statutory mandate cutting the other way. Judge Easterbrook sums it up neatly:

> Even operators of nuclear power plants must bargain with their unions about safety and discipline. It makes no sense to say that the employer must bargain with the union about, say, a proposal for progressive discipline barring discharge for a first offense, and then turn around and invoke "public policy" to allow the firm to discharge an employee for a first offense despite the collective bargaining agreement. The Nuclear Regulatory Commission (NRC) might require discharge

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[17] 1 ABA Section of Labor and Employment Law, The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 897-99 (P. Hardin ed. 3d ed. 1992); *NLRB v. American Nat'l Can Co.*, 924 F. 2d 518 (4th Cir. 1991), *enforcing* 293 N.L.R.B. 901 (1989); *Hi-Tech Cable Corp.*, 318 N.L.R.B. 280 (1995), *enforced in part*, 128 F.3d 271 (5th Cir. 1997). *Cf. Gateway Coal v. Mine Workers*, 414 U.S. 368 (1974).

> but has not done so. As long as the NRC is silent, the *real* public policy at hand is the one requiring employers to bargain with unions *and to live up to the agreements they reach.*[18]

Finally, if we are to consider public policy beyond the limits of positive law, it is only fair to take account of a legitimate concern of working people and society generally. That is the rehabilitation of the wrongdoer. Recognizing the value of reorienting a person who has misstepped is a hallmark of a humane and caring society.[19] That should be of particular concern in an era all too well acquainted with employees "troubled" by drug and alcohol abuse, and with an increasing resort to "employee assistance programs."[20] The one impartial participant in these proceedings who had a chance to observe and assess the grievant, namely, the arbitrator, could conclude that any safety risk here was outweighed by the likelihood of rehabilitation. That judgment should not be overturned from afar on the basis of "speculation or assumption." *Misco*, *supra*, 484 U.S. at 44.

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[18] Easterbrook, *supra* note 10, at 73 (emphasis in the original). See also Edwards, *supra* note 12, at 23-29.

[19] The classic treatment in the penal context is Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose 80-89 (1981).

[20] *See generally Tia Schneider Denenberg & R. V. Denenberg, Alcohol and Other Drugs: Issues* in Arbitration (1991).

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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